No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH, PETITIONER,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Courtney M. Oliva
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6612

Mark W. Mosier
Counsel of Record
Rafael Reyneri
James O. Strawbridge
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
mmosier@cov.com

Counsel for Amici Curiae

(Additional counsel listed on inside cover)

Priya Raghavan
Counsel, Justice Program
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, 17th Floor
New York, NY 10013

Philip Desgranges
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 19th Floor
New York, NY 10004

Mariana Kovel
Ezekiel Edwards
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004

David Cole
Somil Trivedi
AMERICAN CIVIL LIBERTIES UNION
915 15th St., NW
Washington, DC 20005

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. By Discouraging the Filing of Section 1983 Suits, the Second Circuit's Rule Undermines a Critical Tool for Deterring Prosecutorial Misconduct. 6

A. Section 1983 Suits Play an Important Role in Deterring Prosecutorial Misconduct. 7

B. The Second Circuit's Rule Reduces the Deterrent Effect of Section 1983 Suits by Discouraging Plaintiffs From Filing Even Meritorious Claims. 12

II. By Inviting Parallel Criminal and Civil Proceedings, the Second Circuit's Rule Interferes with the Fair and Efficient Administration of the Criminal Justice System. 15

A. Parallel Proceedings Needlessly Divert the Parties' Attention from the Criminal Proceeding 16

B. Parallel Proceedings Distort the Parties' Strategic Decisions. 20

C. Parallel Proceedings Can Lead to Conflicting Decisions That Undermine Public Confidence in the Judiciary 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Afro-Lecon, Inc. v. United States,
820 F.2d 1198 (Fed. Cir. 1987) 20, 23

Allen v. McCurry, 449 U.S. 90 (1980) 15, 21

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 13

Berger v. United States,295 U.S. 78 (1935) 3

Bradford v. Scherschligt,
803 F.3d 382 (9th Cir. 2015) 6

Carlson v. Green, 446 U.S. 14 (1980) 7

Castellano v. Fragozo,
352 F.3d 939 (5th Cir. 2003) 6

City of Riverside v. Rivera,477 U.S. 561 (1986) 7

Degen v. United States, 517 U.S. 820 (1996) 18

Floyd v. Attorney General,
722 F. App'x 112 (3d Cir. 2018) 6

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Imbler v. Pachtman, 424 U.S. 409 (1976) 7, 9, 10

Landis v. N. Am. Co., 299 U.S. 248 (1936) 18

Mills v. Barnard, 869 F.3d 473 (6th Cir. 2017) 6

Mondragón v. Thompson,
519 F.3d 1078 (10th Cir. 2008) 6

Montana v. United States, 440 U.S. 147 (1979) 22

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964) 20

Owen v. City of Independence, Mo.,
445 U.S. 622 (1980) 7, 8

Patsy v. Bd. of Regents of Fla.,
457 U.S. 496 (1982) 19

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005) 20

Scheuerman v. City of Huntsville,
373 F. Supp. 2d 1251 (N.D. Ala. 2005) 19

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912) 19

United States v. Atkinson,
297 U.S. 157 (1936) 22

United States v. Olano, 507 U.S. 725 (1993) 22

Wallace v. Kato, 549 U.S. 384 (2007) 18

Weil v. Markowitz,
829 F.2d 166 (D.C. Cir. 1987) 18

Wyatt v. Cole, 504 U.S. 158 (1992) 7

Younger v. Harris, 401 U.S. 37 (1971) 15, 21, 22

Statutes

18 U.S.C. § 242 ..... 10, 11

42 U.S.C. § 1983 ..... *passim*

Other Authorities

Cal. Comm'n on the Fair Admin. of Justice, *Final Report* (2008) 12

CTR. FOR PUB. INTEGRITY, *Harmful Error: Investigating America's Local Prosecutors* (2003) 10

Editorial Board, *A Prosecutor Is Punished*, N.Y. TIMES (Nov. 8, 2013) 10

Lauren-Brooke Eisen et al., *Federal Prosecution for the 21st Century*, BRENNAN CENTER FOR JUSTICE, (Sept. 23, 2014) 13

Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) 8

Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (2005) 10

JUSTICE POLICY INSTITUTE, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (Sept. 2012) 14

David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011) 14

N.Y. State Bar Ass'n, *Final Report of the N.Y. State Bar Ass'n's Task Force on Wrongful Convictions* (2009) 11

Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) 9

Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) 8, 9

Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, TEX. TRIB. (Nov. 8, 2013) 10

INTEREST OF *AMICI CURIAE*

Amici curiae are four organizations that have an interest in the fair and efficient administration of criminal justice.[1]

Center on the Administration of Criminal Law at NYU School of Law. The Center is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[2] The Center regularly participates as *amicus curiae* in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

American Civil Liberties Union. The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil-rights laws.

---

[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] *Amici* the Center on the Administration of Criminal Law and the Brennan Center for Justice are affiliated with New York University, but no part of this brief purports to represent the views of New York University School of Law or New York University.

Founded nearly 100 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as *amicus curiae*. Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people accused of crimes.

New York Civil Liberties Union. The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union and is a non-profit, non-partisan organization with over 180,000 members. The NYCLU is devoted to the protection and enhancement of fundamental rights and liberties. Among the most fundamental are the rights to justice and fairness for defendants in the criminal justice system. The NYCLU regularly participates as *amicus curiae* in cases that raise questions about fundamental rights and liberties.

Brennan Center for Justice at NYU School of Law. The Brennan Center is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair criminal justice system. The Brennan Center advocates for reshaping laws and public policies that undermine this vision.

Amici's interests are directly affected by the issues presented in this case. The Second Circuit adopted a rule for accrual of Section 1983 claims based on fabrication of evidence that interferes with the fair and efficient administration of criminal justice. Because the Second Circuit's rule threatens the legitimacy of the criminal justice system and the public's faith in it,

amici respectfully request that the Court reverse the decision below and hold that Petitioner's Section 1983 claim did not accrue until his criminal proceedings ended in his favor.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution's guarantee of a fair and impartial criminal justice system can be achieved only if prosecutors are committed to ensuring "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court long ago rejected the notion that prosecutors should try to secure convictions at all costs, because "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

The fairness and legitimacy of the criminal justice system depend on the safeguards that deter prosecutors from engaging in misconduct. Civil lawsuits seeking monetary damages under 42 U.S.C. § 1983 play a critical role in deterring prosecutorial misconduct, but the Second Circuit's decision in this case threatens to weaken their effectiveness.

Under the Second Circuit's ruling, a Section 1983 claim based on fabrication of evidence accrues when the defendant "learn[s] of the fabrication of the evidence and its use against him in criminal proceedings." Pet. App. 13a. The limitations period thus begins to run for many defendants at the start of criminal proceedings, when defendants are "indicted and arrested" and learn of the evidence being used against them. *Id.* Because criminal proceedings often

take years to conclude, starting the limitations period for a fabrication-of-evidence claim so early means that many defendants are forced to make a difficult choice: they must either forgo bringing a Section 1983 suit or initiate parallel civil actions while their criminal proceedings are ongoing. Regardless of which choice a defendant makes, the justice system and our trust in it suffer.

I. Section 1983 suits play an important role in deterring prosecutorial misconduct. They deter prosecutorial misconduct because the threat of monetary damages affects a prosecutor's behavior, as will the reputational costs that accompany public accusations that the prosecutor has violated the Constitution or other federal law. Although this Court has suggested that prosecutorial misconduct can also be deterred through criminal prosecutions and bar disciplinary proceedings, prosecutors are subject to those sanctions so infrequently and unsuccessfully that they do not adequately deter misconduct. Those proceedings are also inadequate because they do not provide redress to the victims of constitutional misconduct, nor do they typically halt illegal practices at a systemic level, as Section 1983 claims can.

Section 1983 suits cannot deter misconduct if criminal defendants do not file them. By requiring the defendant to file a civil suit before criminal proceedings are complete, the Second Circuit's rule discourages Section 1983 suits, even when they have merit. Faced with the prospect of initiating parallel proceedings, many criminal defendants will reasonably give up the prospect of monetary damages in a civil

suit because pursuing that remedy may prejudice resolution of the criminal proceeding. This prejudice can take many forms. Filing a civil suit against a prosecutor could sufficiently anger the prosecutor that he or she will seek a longer sentence, add charges or enhancements, or be less willing to negotiate a plea agreement—all of which are virtually unreviewable acts of discretion. Filing a civil suit also could require the criminal defendant to reveal his defense strategy and risk self-incrimination. And for those defendants willing to file a civil suit while criminal proceedings are pending, they still may not do so because the strength of the suit will be hard to determine before the criminal proceedings conclude. As a result, finding a lawyer to bring the case could prove to be too difficult—particularly for low-income defendants.

II. Even if a criminal defendant risks filing a Section 1983 suit while criminal proceedings are ongoing, that suit will come at a significant cost to the criminal justice system. Parallel criminal and civil proceedings interfere with the fair and efficient administration of the criminal justice system in at least three ways. *First*, parallel proceedings split the parties' resources and attention between the criminal and civil proceedings. *Second*, parallel proceedings affect the parties' strategic decisions. *Third*, parallel proceedings create the risk of inconsistent rulings and judgments in the criminal and civil proceedings, which undermines the legitimacy of the criminal proceedings.

This Court can avoid these problems by rejecting the Second Circuit's rule in favor of the approach taken by the overwhelming majority of the courts of appeals that have decided the issue. Those courts

have held that a Section 1983 claim based on fabrication of evidence accrues upon the conclusion of criminal proceedings in the defendant's favor.[3] *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (endorsing approach that "avoids parallel litigation").

ARGUMENT

I. BY DISCOURAGING THE FILING OF SECTION 1983 SUITS, THE SECOND CIRCUIT'S RULE UNDERMINES A CRITICAL TOOL FOR DETERRING PROSECUTORIAL MISCONDUCT.

Prosecutions involving fabricated evidence deprive defendants of fair judicial proceedings and undermine public confidence in the judicial system. The integrity of the criminal justice system therefore demands that prosecutors, police officers, and other state officials are adequately deterred from fabricating evidence for use in criminal proceedings. Civil lawsuits seeking monetary damages under Section 1983 provide a powerful deterrent for the prosecutorial misconduct at issue here. Yet the Second Circuit's ruling threatens to weaken the deterrent effect of Section 1983 suits by

---

[3] *See Floyd v. Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018); *Castellano v. Fragozo*, 352 F.3d 939, 959–60 (5th Cir. 2003) (en banc); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017); *Bradford v. Scherschligt*, 803 F.3d 382, 387–89 (9th Cir. 2015); *Mondragón v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). The Second Circuit stands alone as the only court of appeals to hold that a fabrication-of-evidence claims accrues when the plaintiff learns that the prosecution has relied on fabricated evidence. *See* Pet. App. 12a-13a.

discouraging criminal defendants from bringing these suits, even when their claims have merit.

A. Section 1983 Suits Play an Important Role in Deterring Prosecutorial Misconduct.

1. Section 1983 claims are a "vital component of any scheme" for addressing prosecutorial misconduct, like fabrication of evidence. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980). This is because Section 1983 serves two purposes: it compensates individual plaintiffs and, equally important, deters future misconduct. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (Section 1983 acts "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). The statute embodies Congress's determination that "the public as a whole has an interest in the vindication of the rights conferred by [Section 1983], over and above the value of a civil rights remedy to a particular plaintiff." *City of Riverside v. Rivera*, 477 U.S. 561, 574–75 (1986).

"It is almost axiomatic that the threat of damages has a deterrent effect." *Carlson v. Green*, 446 U.S. 14, 21 (1980); *see also Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct."). The knowledge that a government actor will be liable for misconduct creates an "incentive for officials who may harbor doubts about the lawfulness of their intended actions to err

on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651–52. The threat of damages also encourages policymakers to adopt rules and programs aimed at minimizing the infringement of constitutional rights, which "are particularly beneficial in preventing [] 'systemic' injuries." *Id.* at 652. Finally, "valuable information is unearthed and exposed" over the course of Section 1983 litigation, which can engender policy changes either because this information was "previously unknown" or because policymakers are pressured by "publicity that attends the exposure of the information." Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–61 (2001).

Section 1983 suits have proven to have a deterrent effect in practice. Police departments have used lawsuit data—information generated during civil litigation, including damages awards and evidence uncovered by discovery—to identify systemic problems and calibrate personnel and training decisions accordingly. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012). For example, the Portland police department performed trend analyses on lawsuit data, which allowed it to identify that excessive force claims involving blows to the head were disproportionately being asserted against officers at one police station. *Id.* at 854. Following training, those claims declined. *Id.* The Los Angeles Sheriff's Department similarly used litigation data as part of a semiannual review to identify that two of its 23 stations were responsible for 70 percent of all police misconduct litigation over the six-month period under review. *Id.* at 855. That finding led to an

investigation into those stations, which triggered staffing changes and training. *Id.* at 856. As a result, "the number of shootings at the station ... dropped dramatically, even as the crime statistics and arrests remained stable." *Id.*[4]

2. The Court has expressed concern that Section 1983 suits may over-deter prosecutors as a general matter, causing them to "shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." *Imbler*, 424 U.S. at 423. Prosecutorial immunity thus bars suits against prosecutors for their prosecutorial functions. And the powerful deterrent effect of Section 1983 suits is unnecessary, the Court has explained, because a prosecutor engaging in misconduct may face criminal prosecution or bar disciplinary proceedings. *See id.* at 429. But the Court's reasons for prohibiting certain kinds of Section 1983 claims against prosecutors do not apply when, as here, a prosecutor is accused of fabricating evidence.

The Court should not be concerned about prosecutors being overly deterred when the issue is whether to fabricate evidence for use in criminal proceedings. Prosecutors must frequently exercise discretion and

---

[4] Section 1983 claims even have a deterrent effect on government agencies who are insured from having to pay damages awards. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1211 (2016) ("Insured agencies may feel pressures associated with payouts even more acutely, regardless of whether they directly contribute to insurance premiums."). This is because public agency insurers, like other insurers, engage in risk management by pricing insurance based on past conduct and using limits and deductibles to reduce moral hazard. *See id.* at 1205.

make tough judgment calls, but deciding whether to fabricate evidence and introduce it at trial is not such a decision. Indeed, the district court correctly recognized that a prosecutor's immunity does not extend to allegations that he fabricated evidence, because the fabrication of evidence is not a prosecutorial function. *See* Pet. App. 61a. Section 1983 suits for fabricating evidence do not run the risk of punishing the "honest prosecutor" who in good faith steps over the constitutionally permitted line. *See Imbler*, 424 U.S. at 425. Rather, they serve the necessary purpose of deterring the dishonest prosecutor contemplating whether to fabricate evidence.

Section 1983 suits are necessary to deter prosecutors from fabricating evidence. The possibility that prosecutors could face criminal charges for their misconduct is too remote to affect their behavior. A 2003 study of more than 2,000 cases involving prejudicial prosecutorial misconduct found that *none* of the prosecutors faced criminal charges for their actions. *See* CTR. FOR PUB. INTEGRITY, *Harmful Error: Investigating America's Local Prosecutors*, at app. 79–90 (2003); *see also* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 60 (2005).[5] Federal prosecutions under 18 U.S.C. § 242

---

[5] Since the study was completed, one prosecutor was criminally prosecuted and convicted for obtaining a wrongful conviction by withholding evidence and making false statements to the court. *See* Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, TEX. TRIB. (Nov. 8, 2013), https://www.texastribune.org/2013/11/08/ken-anderson-serve-jail-time-give-law-license. The newsworthiness of this conviction demonstrates how rare these prosecutions are. *See* The Editorial Board, *A Prosecutor Is Punished*, N.Y. TIMES (Nov. 8, 2013),

confirm this point. This provision was enacted in 1866 to provide criminal liability for government officials who violate constitutional protections. Johns, *supra*, at 71. But in the 153 years since its enactment, only one prosecutor has been convicted under the statute. *See id.*

Disciplinary actions by state bars are similarly ineffective as a deterrent. Of the more than 2,000 cases involving prejudicial prosecutorial misconduct identified in the Center of Public Integrity report, prosecutors were disciplined in only 44 cases. CTR. FOR PUB. INTEGRITY, *supra*, at app. 79. State bar associations—who are tasked with policing prosecutorial misconduct—recognize the problem. A New York Bar Association task force concluded that, among the 53 wrongful conviction cases it surveyed, it did not find any "public disciplinary steps against prosecutors," and concluded that prosecutors face "little or no risk" as a result of their misconduct. N.Y. State Bar Ass'n, *Final Report of the N.Y. State Bar Ass'n's Task Force on Wrongful Convictions*, at 29 (2009), https://www.nysba.org/wcreport. Similarly, a California commission analyzed 54 cases involving prejudicial misconduct and found that none of these cases resulted in a report to the state bar—even though state law requires judges to give such notice.

---

https://www.nytimes.com/2013/11/09/opinion/a-prosecutor-is-punished.html ("The 10-day jail sentence for the prosecutor, Ken Anderson, is insultingly short—the victim of his misconduct, Michael Morton, spent nearly 25 years in prison. But because prosecutors are so rarely held accountable for their misconduct, the sentence is remarkable nonetheless.").

See Cal. Comm'n on the Fair Admin. of Justice, *Final Report* 71 (2008), https://bit.ly/2Tpp6fq.

In short, when fabrication of evidence is at issue, over-deterrence should not be a concern, and criminal and disciplinary proceedings are insufficient. Section 1983 suits are thus essential to deter prosecutorial misconduct.

B. The Second Circuit's Rule Reduces the Deterrent Effect of Section 1983 Suits by Discouraging Plaintiffs From Filing Even Meritorious Claims.

Section 1983 suits can deter prosecutorial misconduct only if plaintiffs are willing to file them. Under the Second Circuit's rule, many criminal defendants will reasonably choose not file Section 1983 suits—even if they have a strong claim—because of the risk inherent in filing a civil suit before criminal proceedings have concluded. Many defendants will make a strategic decision to give up the prospect of monetary damages in the civil suit to maximize the likelihood of prevailing in the criminal proceeding. And for those defendants who do not make this strategic choice, they still may not file a Section 1983 suit for a practical reason: many defendants—in particular, low-income defendants—could have difficulty finding a lawyer to take the case.

1. A criminal defendant may rationally decide not to pursue a meritorious Section 1983 claim because doing so while his criminal proceedings are pending could hurt his chances of achieving a favorable resolution in the criminal proceedings.

A criminal defendant often chooses not to testify at trial and instead exercises his Fifth Amendment right not "to be a witness against himself." U.S. Const. Amd. V. But a plaintiff in a Section 1983 suit typically cannot adopt this same strategy. To meet the civil pleading standard required to state a Section 1983 claim, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the criminal defendant must explain when he or she became aware of fabricated evidence and how he or she knew it was fabricated. This explanation would risk disclosing the defendant's trial strategy to the prosecutors to whom he or she is adverse in parallel criminal proceedings.

The concerns over filing a civil suit during the criminal proceedings are even greater for defendants who are considering resolving the criminal charges through a plea agreement.[6] In negotiating a plea deal, defendants are seeking leniency from the government, including by displaying a willingness to cooperate. But naming the prosecutor as a defendant in a civil case could anger the prosecutor, which could imperil the possibility of a favorable plea agreement. Even worse, filing the civil suit could cause the prosecutor to revoke the plea offer entirely, add charges or enhancements, or seek a harsher sentence upon conviction—all of which are virtually unreviewable acts of discretion. Indeed, this concern is one of the reasons why few criminal defendants file state bar complaints even when they are aware of prosecutorial

---

[6] Given that more than 90 percent of criminal cases are resolved by plea bargain, this is virtually every defendant. *See, e.g.*, Lauren-Brooke Eisen et al., *Federal Prosecution for the 21st Century*, BRENNAN CENTER FOR JUSTICE, 27 (Sept. 23, 2014), https://bit.ly/2UbiJJL.

misconduct. *See* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211 (2011).

2. Criminal defendants also are less likely to file a Section 1983 suit before criminal proceedings conclude because they will have more difficulty retaining counsel to bring the suit. Attorneys are more likely to bring Section 1983 fabrication-of-evidence claims once they can see that the claims have some merit. But the strength of a Section 1983 claim is typically difficult to judge until after the criminal proceedings are complete. *See id.* at 210 ("vast majority of known instances of prosecutorial misconduct" are substantiated over the course of a trial or appellate proceedings).

This concern is especially great for low-income criminal defendants. Such individuals are more likely to be subjected to pretrial incarceration. *See* JUSTICE POLICY INSTITUTE, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, at 10 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf (since 1992, use of money bail has increased 32 percent and average bail amounts have increased by $30,000). And individuals who are detained pretrial are less able to secure and work with counsel to prepare their case. *See id.* at 13.

Section 1983 suits can serve as a powerful deterrent to prosecutorial misconduct only if criminal defendants are willing and able to file them. The Second Circuit's rule, by forcing many plaintiffs to file

suit while their criminal proceedings are ongoing, discourages filing of meritorious suits, and thus weakens the deterrent effect of these suits.

II. BY INVITING PARALLEL CRIMINAL AND CIVIL PROCEEDINGS, THE SECOND CIRCUIT'S RULE INTERFERES WITH THE FAIR AND EFFICIENT ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM.

Despite the practical obstacles to, and strategic reasons for not filing a Section 1983 suit while criminal proceedings are ongoing, some defendants will surely still initiate a parallel civil proceeding. Because of the difficulties inherent in administering parallel proceedings, those suits—while potentially protecting the defendant's rights—threaten to harm the criminal justice system more broadly.

This Court has long recognized the importance of "avoid[ing] parallel litigation." *Heck*, 512 U.S. at 484. Parallel litigation is undesirable in part because it raises a host of practical problems. It also wastes judicial resources and increases the costs of litigation. Moreover, parallel proceedings raise difficult legal issues related to the preclusive effect decisions in one forum have in the other. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980) (applying collateral estoppel to Section 1983 claims). As a result, the Court has sought to "avoid a duplication of legal proceedings ... where a single unit would be adequate to protect the rights asserted." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Here, parallel criminal and civil proceedings would interfere with the fair and efficient administration of the criminal justice system in at least three ways. *First*, they split the parties' resources and attention between the criminal and civil proceedings. *Second*, they distort the strategic decisions that the parties make. *Third*, they create the risk of inconsistent rulings and judgments in the criminal and civil proceedings, which can call the legitimacy of both proceedings into question. The Court should avoid these problems by rejecting the Second Circuit's rule.

A. Parallel Proceedings Needlessly Divert the Parties' Attention from the Criminal Proceeding.

A criminal proceeding carries such serious consequences, for both the defendant and the general public, that the prosecutor and defendant should be allowed to focus their attention on that matter. Only once the criminal proceeding has completed should the parties turn their attention to the civil rights matter. By instead encouraging criminal defendants to file parallel civil suits, the Second Circuit's rule interferes with both the prosecutor's ability to prosecute the case and the defendant's ability to defend himself.

1. Section 1983 lawsuits filed during criminal proceedings threaten to divert both parties' time and resources from the criminal proceedings. Parallel proceedings may require prosecutors to prepare for trial in the criminal proceeding while they sit for depositions or respond to discovery requests in the civil case. The potential for distraction is even greater for criminal defendants who file civil actions. They cannot

simply focus on developing a defense strategy that best serves their interests in the criminal proceeding. They must instead devote considerable resources to the civil action, advancing their own legal theories and conducting the discovery necessary to prove them. Given the importance of criminal proceedings—where defendants often face the possibility of decades in prison—they should give their complete attention to defending their liberty, rather than simultaneously focusing on damages actions.

2. The problem of diverting the parties' attention from the criminal matter is exacerbated by the fact that the parties may devote substantial time and effort to litigating issues that would not arise if the civil suit were brought after the criminal proceedings conclude.

For example, the Second Circuit's rule risks spawning needless litigation over when the Section 1983 claim accrued. Under the majority rule, a fabrication-of-evidence claim accrues when the criminal proceedings conclude in the defendant's favor. This accrual date can be determined without discovery by referring to the docket in the criminal case. In contrast, a fabrication-of-evidence claim accrues under the Second Circuit rule when the defendants knows, or should have known, about the fabrication of evidence. *See* Pet. App. 13a. Intrusive discovery—potentially including discovery involving the defendant's communications with his defense lawyers—will often be necessary to determine when the defendant learned of the fabricated evidence. Indeed, it is telling that the Second Circuit did not specify when the fabrication-of-evidence claim accrued under its rule,

stating only that it was somewhere between when Petitioner was "indicted and arrested" and when his first trial concluded. Pet. App. 13a–14a.

3. Given the problems created by parallel proceedings, a party in the civil case may seek a stay pending completion of the criminal proceeding. *See Wallace v. Kato*, 549 U.S. 384, 393–94 (2007). But the possibility of a stay hardly alleviates the problems caused by parallel litigation. This Court has never suggested that a stay should be granted as a matter of course. Instead, as discussed below, whether to grant a stay requires balancing the equities in a particular case. Even when those equities favor a stay, the parties still must litigate the stay motion in each case. And doing so will require expending time and resources that would be better spent on the criminal proceedings.

District courts have broad discretion over whether to grant a stay. When faced with a request to stay civil proceedings or limit civil discovery, they must "weigh competing interests" arising from the parallel proceedings, *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936), and consider what "the interests of justice" require, *Degen v. United States*, 517 U.S. 820, 826–27 (1996). Because "[a] total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy," *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987), some courts may permit discovery to avoid prejudicing the plaintiff in the civil lawsuit.

But even when the civil case is stayed, parallel proceedings still are inefficient and interfere with the

parties' ability to focus on the criminal matter. To obtain a stay of the civil lawsuit, a party must show that a stay is necessary—a fact-intensive and time-consuming process that distracts from the criminal proceeding as well as the merits of the allegations raised in the civil action. *See, e.g., Scheuerman v. City of Huntsville*, 373 F. Supp. 2d 1251, 1258 (N.D. Ala. 2005) (prosecutors seeking a stay must "explain in detail" the impact of civil discovery on the related criminal proceeding).[7]

In short, parallel proceedings will necessarily divert the parties' attention from the matter that should take priority—the criminal proceedings. Both the prosecutor and criminal defendant are better served by focusing first on the criminal matter, and then turning to Section 1983 litigation, if necessary, once the criminal proceedings conclude.

---

[7] The Court should not adopt a rule allowing for automatic stays of Section 1983 suits, because automatic stays are at odds with the purpose of those suits—"to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503 (1982); *see also Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) ("An imperative rule that the civil suit must await the trial of the criminal action might result in injustice."). And if the Second Circuit's accrual rule can be efficiently administered only if district courts automatically issue stays, then the rule has no practical value. This outcome would undermine the purpose of an early accrual date by prohibiting claims from advancing before criminal proceedings conclude.

B. Parallel Proceedings Distort the Parties' Strategic Decisions.

The Second Circuit's rule also undermines the fair and efficient administration of criminal justice because it affects the strategic decisions that the parties make. When the parties are involved in related criminal and civil matters, they cannot simply make decisions based on the criminal proceeding. They also must consider how their actions affect the civil action.

Criminal defendants are most severely harmed by the need to balance potentially conflicting strategies. As defendants in the criminal matter, they may remain silent and force the government to carry its burden of proving guilt beyond a reasonable doubt. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964) (privilege against self-incrimination reflects "our sense of fair play which ... requir[es] the government in its contest with the individual to shoulder the entire load"). In contrast, as plaintiffs in the Section 1983 case, they bear the burden of proving their claims and therefore must advance their own legal theories and develop the evidence to prove them. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (noting "ordinary default rule that plaintiffs bear the risk of failing to prove their claims"). Moreover, any evidence that a prosecutor obtained during the civil case likely would be admissible in the criminal proceeding. *E.g.*, *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1200 (Fed. Cir. 1987). As a result, a defendant's ability to defend himself in the criminal proceeding could be undermined by any discovery the prosecutor obtains in the civil proceeding. To maximize their chances of success in both

proceedings, criminal defendants must often make strategic decisions that differ from the choices they would make based solely on the criminal proceeding.

Rather than permit a pending civil suit to affect the strategy—and perhaps the outcome—of the criminal proceeding, the Court should reject the Second Circuit's rule and hold that a Section 1983 claim based on fabrication of evidence does not accrue until the criminal proceeding has ended.

C. Parallel Proceedings Can Lead to Conflicting Decisions That Undermine Public Confidence in the Judiciary.

By encouraging parallel litigation, the Second Circuit's rule will increase conflict between federal and state courts, threatening to undermine public confidence in the judiciary.

As this Court has recognized, parallel litigation poses a fundamental risk to our federalism. By encouraging federal courts to use Section 1983 claims to preempt state-court decisions, the rule adopted below threatens to erode the "proper respect for state functions," *see Younger*, 401 U.S. at 43–44, that is "a bulwark of [our] federal system" of government, *see Allen*, 449 U.S. at 96. This concern for comity, as well as the more practical problems of parallel litigation, provide the basis for this Court's policy against federal interference in state criminal proceedings. *See Heck*, 512 U.S. at 484 (noting the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction").

Maintaining an appropriate "sensitivity to the legitimate interests of both State and National Governments," *Younger*, 401 U.S. at 44, is fundamental to preserving public confidence in our criminal justice system. That confidence is rooted in the orderly administration of justice and the finality of judicial decisions. *Cf. Montana v. United States*, 440 U.S. 147, 154 (1979) ("[M]inimizing the possibility of inconsistent decisions" is desirable in part because it "fosters reliance on judicial action"); *United States v. Atkinson*, 297 U.S. 157, 159 (1936) (noting "the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact").

A rule that encourages parallel litigation undermines the orderly administration of justice and finality and thus threatens to erode public confidence in the judiciary. *Cf. Heck*, 512 U.S. at 484–85 ("This Court has long expressed ... concerns for finality and consistency and has generally declined to expand opportunities for collateral attack."). Put differently, a rule that requires federal courts to respect state court proceedings will encourage the public to do the same. *Cf. United States v. Olano*, 507 U.S. 725, 736 (1993) (allowing appellate courts to correct plain forfeited errors affecting substantial rights if such errors "seriously affect[] the ... public reputation of judicial proceedings").

The Second Circuit's rule harms both federal-state relations and public confidence in the judiciary. First, it undermines the orderly administration of justice. For instance, the Second Circuit rule requires many criminal defendants to initiate parallel proceedings in

federal court in order to preserve their evidence-fabrication claims, but it also implies those same defendants must halt federal litigation if and when a conviction occurs—and then restart it if and when the conviction is reversed so that the *Heck* bar no longer applies. *See* Pet. App. 16a.

Second, by encouraging parallel proceedings, the Second Circuit's rule promotes federal-state conflicts, wastes resources, undermines finality, and raises a host of difficult legal issues. For example, the Second Circuit's rule would routinely force federal courts to confront issues such as the effect a denial of a motion to suppress allegedly fabricated evidence would have on a parallel Section 1983 claim. *Cf. Afro-Lecon*, 820 F.2d at 1200 (addressing whether district court erred in failing to stay civil proceedings where (1) plaintiff initiated civil case, (2) government indicted the plaintiff, (3) plaintiff's motions (one before and one after the indictment) to stay the civil case were denied, (4) government used deceptive means to obtain civil discovery for use in its criminal case, (5) now-criminal defendant's motion to suppress evidence in question in the criminal case was denied in part, and (6) civil plaintiff appealed the decision in the civil case, before a criminal trial had occurred).

The majority rule avoids these concerns. And by promoting respect for state courts, the orderly administration of justice, and the finality of judicial decisions, the majority approach also promotes public confidence in our criminal justice system.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed.

Respectfully submitted,

Courtney M. Oliva
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6612

Mark W. Mosier
Counsel of Record
Rafael Reyneri
James O. Strawbridge[8]
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Priya Raghavan
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, 17th Floor
New York, New York 10013

Mariana Kovel
Ezekiel Edwards
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004

Philip Desgranges
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 19th Floor
New York, NY 10004

David Cole
Somil Trivedi
AMERICAN CIVIL LIBERTIES UNION
915 15th St., NW
Washington DC 20005

March 2019

Counsel for Amici Curiae

---

[8] Member of the Bar of Maryland, District of Columbia Bar membership pending; supervised by principals of the Firm.

Attorney's Office decided to pursue a retrial—with the death penalty yet again as an option.

On August 8, 2016, Wright's retrial began. The prosecution relied on the same fabricated evidence as at Wright's first trial. On August 23, 2016, the jury deliberated for less than ten minutes before acquitting Wright on all charges. As the jury foreperson explained, "[t]he evidence was so compelling for Tony that there really could not have been any other verdict."[6]

Wright was finally released from prison on August 23, 2016—more than 25 years after he was first wrongly incarcerated based on fabricated evidence, and nearly two years after his conviction was first vacated. Wright was 20 years old when he was arrested and 45 years old when he was finally freed. He was deprived not only of decades of his own life but also the opportunity to watch his son—who was 4 years old when he was arrested—grow up.

After his acquittal, Wright brought a § 1983 wrongful conviction suit against the PPD detectives who framed him by fabricating his confession and other inculpatory evidence against him. Wright also brought claims against the City of Philadelphia, alleging that systematic failures in supervision and discipline created a Wild West atmosphere where detectives routinely engaged in egregious misconduct.

---

[6] Vernon Odom, *Supporters Speak Out After Wrongly-Convicted Man Freed After 25 Years*, ABC6 Philadelphia (Aug. 24, 2016), https://perma.cc/3YAT-G68Y.

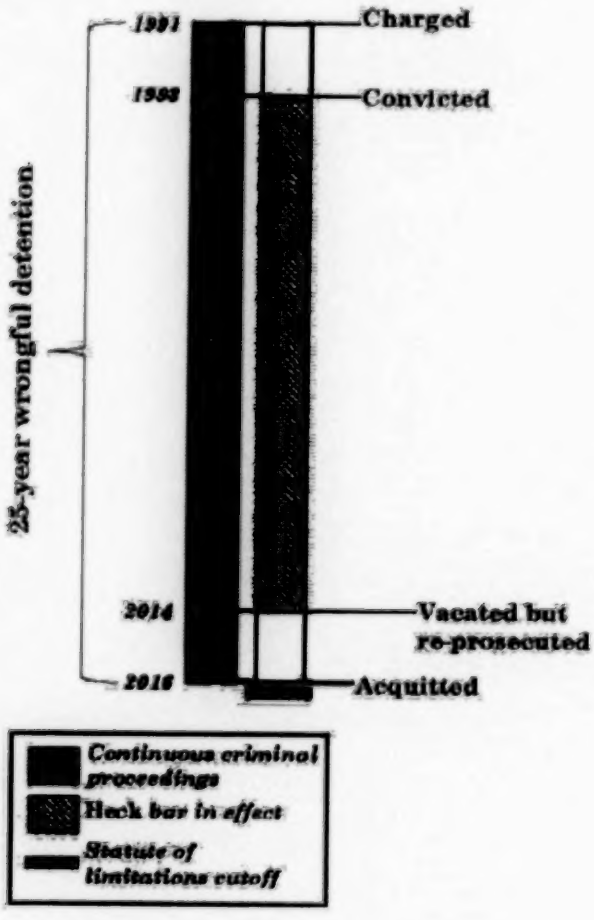
The lawsuit settled in June 2018.[7] Evidence of patterns of misconduct uncovered as part of Wright's suit is now being considered as a part of claims that the same detectives framed other innocent African-American men.[8]

---

[7] Mensah M. Dean & Mark Fazlollah, *Philly Man, Wrongly Imprisoned for 25 Years, Gets Nearly $10 Million from City*, The Inquirer (June 6, 2018), https://perma.cc/26Y7-HNEM.

[8] Chris Palmer & Jeremy Roebuck, *Could One Philly Man's Exoneration Prompt Larry Krasner to Examine Other Decades-old Murders?*, The Inquirer (Feb. 16, 2018), https://perma.cc/3SDV-WH3K.

Chart 4: Anthony Wright's Case



Under *Heck*, Wright could not have brought his § 1983 suit until his conviction was vacated on September 22, 2014. At that time, though, he was facing re-prosecution with potential capital charges. Under the majority rule, accrual of his § 1983 suit would be further delayed until the criminal

proceedings finally resolved in his favor with the acquittal. But had the Second Circuit's accrual rule applied to his case, accrual would not have been deferred while those charges remained pending. Wright would have had to file a § 1983 suit while fighting to defend his life or risk being deprived of the opportunity to seek accountability and compensation for his 25 years of wrongful incarceration. Indeed, Wright was acquitted on August 23, 2016—one month before Pennsylvania's two-year statute of limitations on his § 1983 claims would have run. Had the prosecution been granted even one more continuance—or had this happened in one of the jurisdictions with a one-year statute of limitations for § 1983 claims—Wright would not have known whether he was acquitted or re-convicted until, under the Second Circuit's rule, his opportunity to file a § 1983 suit had already expired.

2. The case of John Restivo[9]

John Restivo spent 18 years wrongly imprisoned for a crime he did not commit before being exonerated by DNA evidence. As with Anthony Wright, even after Restivo's conviction was vacated, the prosecution continued to prosecute him based on the same tainted evidence. After the charges were ultimately dismissed, Restivo brought a § 1983 claim for fabrication of evidence. Under the Second Circuit's rule, the statute of limitations on Restivo's claim would have begun to run when his criminal conviction was vacated, despite the fact that he remained subject

---

[9] All facts are taken from pleadings filed on the dockets at *Restivo v. County of Nassau*, No. 06-cv-6720 (JS)(SIL) (E.D.N.Y. 2006), and *Restivo v. Hessemann*, No. 14-cv-4662 (2d Cir. 2014).

to an ongoing criminal proceeding, again exposing him to the very likely outcome of forfeiting his § 1983 claim on statute-of-limitations grounds.

On December 5, 1984, the body of 16-year-old Theresa Fusco was found near railroad tracks in Lynbrook, New York. Fusco—who had been missing for nearly three weeks—had been raped, strangled with a rope and left naked. Understandably, there was immense community pressure to solve this horrific crime.

After months with no arrests, Nassau County detectives became convinced that 26-year-old John Restivo had committed the crime, believing he had abducted Fusco in the van used by his family moving business along with two coworkers. But detectives knew they lacked evidence to make a case against Restivo, and so lead detective Joseph Volpe fabricated some: he took hairs that had been removed from Fusco's body at autopsy and planted them among debris collected during a search of Restivo's van. A subsequent microscopic hair comparison confirmed that these hairs were Fusco's, providing the sole physical or forensic evidence linking Restivo to the crime.

At trial, Restivo and his co-defendant Dennis Halstead both testified to their innocence and presented alibis. Nevertheless, in December 1986, both men were convicted based on Volpe's fabricated forensic connection. Both were sentenced to thirty-three-and-one-third years to life in prison.

Restivo relentlessly sought to prove his innocence. From 1993 to 2003, he repeatedly sought

DNA testing as the technology improved and additional evidence was located. Finally, in 2003, testing on the spermatozoa taken from a vaginal swab collected at Fusco's autopsy definitively excluded Restivo, Halstead and the third defendant, John Kogut, as the source.

On June 11, 2003, the court vacated the convictions of all three men. But the Nassau County District Attorney remained determined to retry them. Despite consistent evidence that 16-year-old Fusco was a virgin, prosecutors spun speculative theories that the semen could have been left by a mysterious consensual partner or an alleged fourth co-conspirator whose identity had remained secret for nearly 20 years. In a vain attempt to prove guilt, DNA testing was ultimately conducted on an astonishing 86 other people—essentially everyone Fusco, Restivo or Halstead knew. But when each person tested was eliminated, that only further confirmed innocence. Two and a half years after the vacatur—on December 19, 2005—prosecutors finally dropped the charges against Restivo and Halstead.

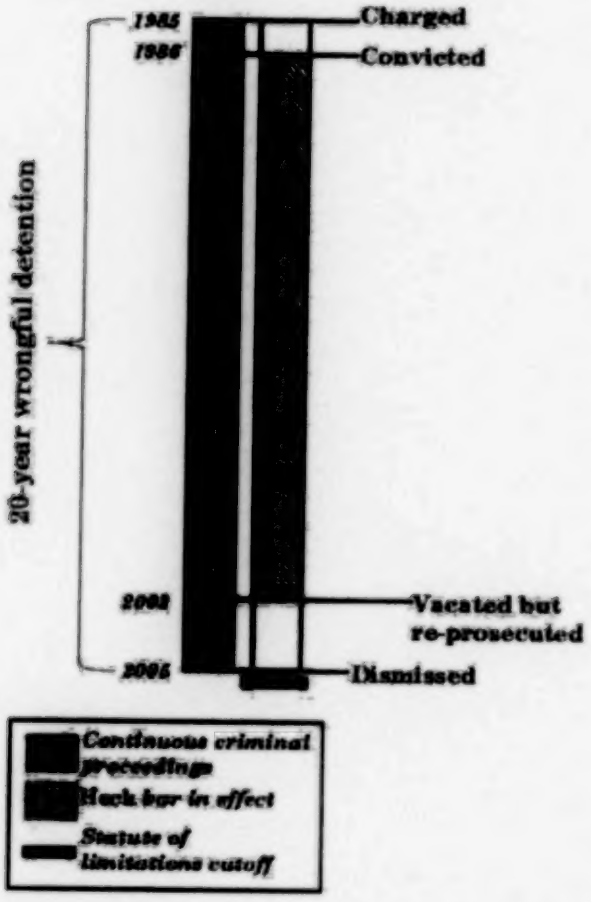
Restivo and Halstead then sued Volpe and the other detectives under § 1983 for fabricating evidence against them. In addition to the evidence of innocence—which proved Fusco's hairs could not have been found in Restivo's van because she had never been in his van—additional forensic evidence proved the hairs had been planted. The hairs allegedly found in Restivo's van bore signs of decomposition that take days post-mortem to develop. But the medical evidence established that Fusco's body had been left where it was found by the railroad tracks within an hour of her death. In other words, this evidence

proved the planted hairs had been collected at the autopsy—after several weeks of decomposition—not left in the van during the alleged abduction as police had claimed.

During discovery in the § 1983 suit, Restivo also learned for the first time of significant exculpatory evidence that had been hidden throughout the entire criminal proceedings. It turned out Volpe and the other detectives had received a tip, the day after Fusco's body was found, that Fusco's murder was connected to a car theft. The car had been stolen around the time Fusco disappeared and within a mile from where she was last seen. When the car was discovered, several weeks later, it was missing a rope (consistent with the murder weapon) and had a pair of striped ladies blue jeans, turned inside out, on the rear floorboard. Those distinctive jeans matched the description of what Fusco was last seen wearing; when her body was found, her clothes were missing. Although detectives spent days investigating this lead, they were unable to determine who had stolen the car. They later buried this exculpatory lead—which likely would have led to the true killer—to protect their case against Restivo and his co-defendants.

In 2014, after years of litigation, a Long Island jury found that Volpe had fabricated evidence and withheld exculpatory evidence, causing Restivo and Halstead's wrongful convictions. The Second Circuit later affirmed the verdict in full.

Chart 5: John Restivo's Case



Like Wright, Restivo had to wait years after his conviction was vacated for the criminal prosecution to be resolved in his favor. Under the majority rule, his time to bring a § 1983 suit would not begin to run until after the charges were dismissed. But had the Second Circuit's accrual rule been applied to him, the statute of limitations would have been running from the time

of the vacatur, even as the criminal charges simultaneously remained pending. As a result, Restivo could easily have missed any opportunity to bring a § 1983 suit against the detective who framed him.

D. Prolonged pretrial detention—the case of Jonathan Barr[10]

Jonathan Barr spent 18 years wrongly imprisoned—more than four years of it in pretrial detention—for a rape and murder he did not commit, before he was exonerated by DNA. Were the Second Circuit's rule to apply, Barr's claim for damages incurred pretrial would have accrued when the fabricated evidence was first used against him, long before he was tried and convicted. And because *Heck* only defers accrual for claims that arise at the time of trial, under the Second Circuit's rule *Heck* would not extend the time to seek damages for his pretrial detention. By the time he could actually sue—after his exoneration—Barr would have been unable to seek any damages for those first 4 years of wrongful incarceration.

In November 1991, 33-year-old convicted sex offender Willie Randolph abducted, raped, and murdered 14-year-old Cateresa Matthews, leaving her body, naked from the waist down, in a field in Dixmoor, Illinois. Jonathan Barr, Matthews's

---

[10] All facts are taken from pleadings filed on the docket at *Barr v. Kachiroubas*, 12-cv-8327 (ARW) (N.D. Ill. 2012), unless otherwise noted.

14-year-old friend and middle school classmate, had nothing to do with these horrific crimes.

But as months went by without an arrest, Illinois State Police investigators began to focus on Barr and four other African-American teenagers. Lacking any true evidence implicating the innocent teens, they interrogated 15-year-old Robert Veal, who had learning disabilities and an IQ of 56. Detectives handwrote a false confession implicating Veal, Barr and the other three teens and coerced Veal to sign it. The statement included nonpublic details about the murder—including the specific clothing Matthews was wearing and the location of her injuries. The detectives falsely claimed these details had originated with Veal and proved the teens' guilt. Although police attempted to fabricate a statement from Barr—providing him a prewritten statement and falsely promising him if he signed it without reading it he could go home—Barr steadfastly refused. Nevertheless, based on Veal's fabricated statement and a similar one from another teen, all five were charged with Matthews's rape and murder.

Trial was delayed while the parties sought DNA testing, then in its infancy. When the results came back, they demonstrated that—contrary to the story in the false confessions—none of the five charged were responsible for Matthews's rape. Nevertheless, the prosecutors refused to drop the charges. At trial, the prosecutors relied on the fabricated evidence, arguing the nonpublic details in the statements were "like mini lie detectors" that proved guilt because "if they weren't there, they wouldn't know that." Barr was convicted in 1997—over four years after he was first

jailed based on the fabricated evidence—and sentenced to 85 years' imprisonment.

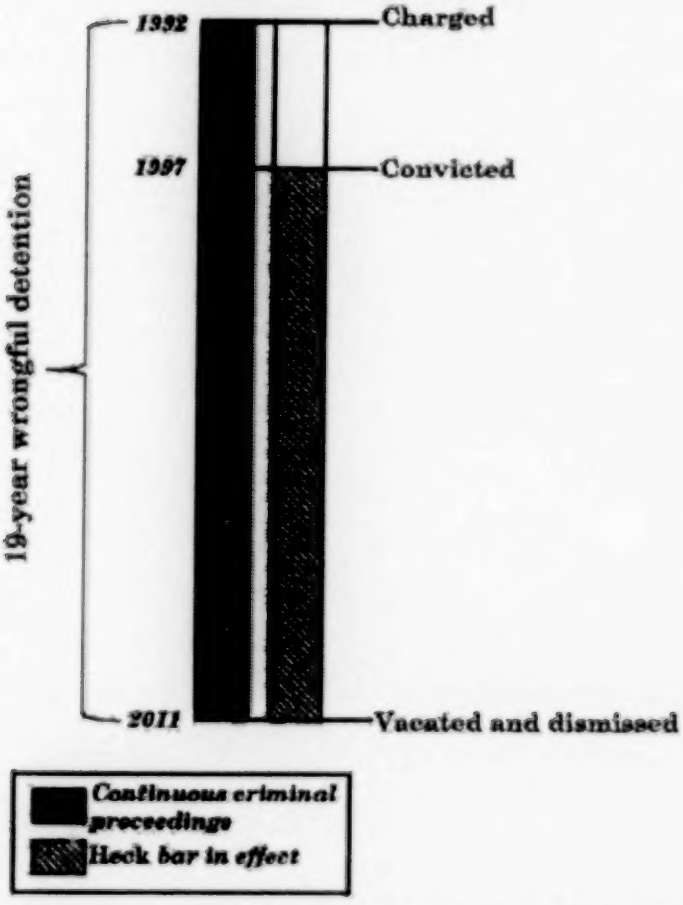
Nearly 14 years later, more advanced DNA testing identified Willie Randolph as the source of the semen found in Matthews's body. In 2011, all five convictions were vacated and the charges later dismissed. Barr was finally released in November 2011, at age 34. During his over 18 years of wrongful imprisonment, both of Barr's parents died. He was not even permitted to attend their funerals. As Barr later explained, "At the end of the day, I can't get those years back. We lost everything . . . My parents, grandparents, everyone is gone. . . . They don't even know the truth now."[11] Barr was later granted a certificate of innocence.

Barr and his co-defendants then brought a § 1983 wrongful conviction suit against the detectives who framed them by fabricating the false confessions. The lawsuit was settled in June 2014. Randolph would later be charged with Matthews's rape and murder in August 2016.

---

[11] Naomi Nix, *"Dixmoor 5" Sue Police, Claim Confessions Were Coerced*, Chicago Tribune (Oct. 18, 2012), https://perma.cc/69PB-U68M.

Chart 6: Jonathan Barr's Case



Had the Second Circuit's accrual rule been applied to Jonathan Barr's case, he would not have been able to seek damages for the over four years of wrongful detention before his 1997 wrongful conviction. That claim would have accrued at some point long before his criminal trial, and the statute of limitations would have expired while he was still incarcerated. Barr would thus have been worse off than an exoneree who spent the exact same total

number of years wrongly incarcerated, merely based on the date of his trial.

And had Barr prevailed at his 1997 criminal trial, it would have then been too late to sue the officers whose fabrication of evidence caused his four years of detention.

* * *

An innocent person facing criminal prosecution based on fabricated evidence is subject to an inexcusable deprivation of his constitutional rights. The Second Circuit's accrual rule places a remedy for that violation out of reach. The individual cannot know in advance of trial whether he will be convicted (in which case any future § 1983 fabrication claim would be *Heck* barred), or he will be acquitted (in which case any such claim may already be too late).

The practical result of this rule would be that some meritorious § 1983 fabrication claims would never get their day in court. That would only serve to compound the injustice affected exonerees endure. Officers who engaged in serious misconduct would not be held accountable. The deterrent effect of successful § 1983 suits create would be lost. And the public, over all, would be worse off.

CONCLUSION

The Second Circuit's accrual rule for § 1983 claims that fabricated evidence caused pretrial detention is inconsistent with the universally recognized accrual rule for § 1983 wrongful-conviction claims provided by *Heck v. Humphrey*. For all the

same reasons deferred accrual applies to § 1983 wrongful-conviction claims, the Court should adopt the same rule here. Additionally, the combination of the *Heck* rule with the Second Circuit's rule produces arbitrary and irrational disparities between otherwise similarly situated parties. This Court should reverse the Second Circuit and clarify that all § 1983 fabrication claims do not accrue until favorable termination of the relevant criminal proceedings.

March 4, 2019

Respectfully Submitted,

BENJAMIN GRUENSTEIN
Counsel of Record
YONATAN EVEN
JONATHAN L. BAKER
MICHAEL W. MARVIN
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 20019-7475
(212) 474-1000
bgruenstein@cravath.com

Counsel for Amicus Curiae